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In the Supreme Court of the United States

October Term, 1971

No. _____

DAVID EUGENE SHELTON,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI To The Court Of Criminal Appeals For The State Of Tennessee

David Eugene Shelton petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Tennessee entered in this case on February 11, 1972, review of which order was denied by the Supreme Court of Tennessee on April 3, 1972.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee is unreported (Appendix, p. 6). The order of the Tennessee Supreme Court denying certiorari is also unreported (Appendix, p. 15).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

That evidence was introduced in the trial below which was the product of an illegal, unlawful and unreasonable search and seizure in violation of petitioner's constitutional rights as guaranteed to him by Amendment IV of the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Constitution, Amendment IV:

"The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . ."

STATEMENT OF THE CASE

Trooper Robert Finchum stated that in the latter part of January he was working on his personal pick-up truck at Hensley's Garage (Appendix, p. 16) [B.E., p. 50]; and he was inside the garage when a 1966 Mustang automobile was driven up and parked outside of the building (Appendix, p. 18) [B.E., p. 53]. He stated that he had a conversation with Mr. Hensley (Appendix, pp. 16 and 22) [B.E., pp. 51 and 58], and that upon information received he did suspect something; and he further testified that he had been given a price for this car and that he was interested in purchasing it if he could get it for that price (Appendix, pp. 18 and 24) [B.E., pp. 54 and 62]. Trooper Finchum then went to the 1966 Mustang and without permission from Mr. Shelton opened the door (Appendix, pp. 19 and 25) [B.E., pp. 55 and 63] and copied down the serial number, which was 6F07T180121, from the door on the driver's side (Appendix, pp. 19 and 23) [B.E., pp. 54 and 60], and he stated that he never entered the car for any other purpose (Appendix, p. 21) [B.E., p. 57]. The counsel for Mr. Shelton objected to the introduction of the testimony and findings of Trooper Finchum (Appendix, pp.

16 and 22) [B.E., pp. 51, 58, and 59]. The trial Judge then overruled the objections of Mr. Shelton's counsel (Appendix, p. 22) [B.E., p. 59]; and then the counsel for Mr. Shelton excepted to the Court's ruling (Appendix, p. 21) [B.E., p. 58].

ARGUMENT

The petitioner contends that when Robert Finchum, a member of the Tennessee Highway Patrol, examined a 1966 Ford Mustang parked at the A-1 Used Parts and Garage and copied down the Serial Number 6F07T180121 this constituted an illegal, unlawful and unreasonable search and seizure. Further, petitioner contends that it constituted reversible error for the Honorable Trial Court to permit Trooper Finchum to testify to these facts in the presence of the jury. Finally, petitioner contends that such conduct on the part of Officer Finchum and the Trial Court's admission of evidence thereto was so grossly illegal and unreasonable as to preclude its being denominated as harmless; and for such conduct, the petitioner contends that he is, as a matter of law, entitled to a reversal.

In regard to this unlawful search and seizure by Trooper Finchum, it will be noted that it was not incident to any arrest. Therefore, it is evident that sufficient probable cause was not present to make the search legal. In his own testimony, Trooper Finchum stated that he suspected the vehicle was stolen because the petitioner was asking only Five Hundred Dollars ($500.00) for it. However, the U. S. Supreme Court has stated that while evidence which would establish the defendant's guilt in a criminal trial is not necessary in order to establish probable cause to search, yet "common rumor or report,

suspicion, or even strong reason to suspect will not suffice." *Henry v. United States,* 361 U.S. 98, 101-102.

The general rule is that a search will only be reasonable where the officers are searching for some specific item or group of items. *United States v. Rabinowitz,* 339 U.S. at 62. General and exploratory searches, without any specific objective, but "in the hope that evidence of crime might be found," are universally condemned as unreasonable and violative of the Fourth Amendment. *United States v. Lefkowitz,* 285 U.S. 452. However, in the instant case, this was the purpose of motive of the unreasonable and unlawful search conducted by Trooper Finchum. Trooper Finchum examined the vehicle in question, copied down its registration number and checked the number with Kingsport to determine whether the vehicle was stolen (Appendix, p. 17) [B.E., p. 52]. In other words, Trooper Finchum searched the vehicle in hopes that evidence of a crime would be found. Therefore, the search was in violation of the Fourth Amendment.

In addition to the above, the petitioner would show to this Honorable Court that his vehicle is protected to the same extent against an unreasonable search as his home would be. *Henry v. United States,* 361 U.S. 98. Although the case of *Carroll v. United States,* 267 U.S. 132, 153 provides for a warrantless search of a moving vehicle where a competent official has probable cause for believing that the vehicle is carrying contraband or illegal merchandise; this rule does not apply here. This vehicle was parked, and the petitioner was not even approached by Trooper Finchum regarding the vehicle. Thus, where the vehicle is parked, as in this case, and where it is practicable to secure a warrant, it is clear that the police may not search without a warrant. And, it is readily apparent that any search without the required warrant is illegal

and unreasonable. Further, no consent to search the vehicle was given by the petitioner.

In light of the above, the petitioner contends that the search and seizure by Trooper Finchum was illegal and unreasonable. Further, the petitioner contends that it was reversible error for the Trial Court to permit testimony regarding this matter to be heard by the jury. Finally, the petitioner contends that such testimony was so prejudicial as to preclude its being harmless error. Therefore, the petitioner contends that he is entitled to a reversal.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully Submitted,

JOHN A. ARMSTRONG
JIMMY GRAY CUTSHAW
JOHN K. WILSON
Greene County Bank Building
Greeneville, Tennessee
Counsel for Petitioner

APPENDIX

OPINION OF THE COURT OF CRIMINAL APPEALS OF TENNESSEE

(Filed February 11, 1972)

No. 58

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT KNOXVILLE
October, 1971

DAVID EUGENE SHELTON,
Plaintiff-in-Error,

vs.

STATE OF TENNESSEE,
Defendant-in-Error.

OPINION

David Eugene Shelton who will be referred to as the defendant or by name represented by his counsel was on September 5, 1970, convicted in the Criminal Court of Greene County, Tennessee of receiving a stolen automobile over the value of $100.00. The jury fixed the punishment at four (4) years in the penitentiary.

After the motion for a new trial was heard and overruled the Trial Judge Honorable H. C. Smith pronounced judgment upon the defendant for not less than three nor more than four years confinement in the penitentiary.

The defendant prayed and was granted an appeal and was allowed ninety days to file a bill of exceptions.

The trial judge directed a verdict of not guilty as to a co-defendant Joelene Showman and the trial jury re-

turned a verdict of not guilty as to another co-defendant Billy Jackie Showman. Another co-defendant Charles M. Cutshaw at a former term May 22, 1970, pleaded guilty of receiving stolen property of more value than $100.00 and was sentenced to three years in the State Penitentiary.

About November 25, 1969, the 1966 Ford Mustang Automobile Serial No. 6F07T180121 was stolen from Bruce McCloud in Knoxville, Tennessee.

About February, 1970 the defendant sold this 1966 green two-door Mustang automobile Serial No. 6F07T 180 121 to Mr. and Mrs. A. F. Munsey. The defendant had received this automobile from Charles M. Cutshaw, who pleaded guilty of receiving the stolen automobile under the indictment in this case.

After the Munseys bought this automobile from the defendant, and on the same day, an acquaintance of theirs, Trooper S. O. Trent of the Tennessee Highway Patrol, saw them with the car at the 11 E. Gulf Station where they showed the car to Trooper Trent, told him they had just bought it and wanted him to look at it. He examined it and told them the serial number was missing from it and advised them to take the automobile back to the seller and get their money back, which they did. After the Munseys returned the automobile to the defendant he negotiated a trade with Ivan Duncan and again transferred possession of the automobile to Ivan Duncan who in turn sold it to Jewel City Motors. The defendant was a Notary and showed the transfer of title as passing from Mrs. Munsey to Duncan instead of showing it was from him to Duncan. The defendant had purchased a wrecked 1965 Mustang from Mr. Showman along with the title to the 1965 car and it was this 1965 title which he transferred to Mrs. Munsey as being the title to the stolen 1966 Mustang.

The defendant Shelton had been in the used car business for five years and was familiar with automobile trade procedures.

Later a more extensive investigation and examination of the car developed that a manufacturer's confidential serial number was found on the frame of the vehicle which apparently had not been known to the owners, the defendant or the dealers.

The proof shows that Embers Hensley operated A and 1 Used Cars and Parts business. The defendant Shelton about January, 1970 came to his place and asked if he had a title for a 1966 Mustang 6 Cylinder car and Hensley told him he had 2 or 3 and the defendant said he needed one and that he wanted to buy one and was willing to pay for it and displayed a hand full of money. Hensley told the defendant the titles had to be sent into the State. Hensley declined to sell the defendant a title but told him it was against the law. That these titles were for the wrecked cars he had there from which he was removing the parts, and the serial plates had to be pulled off of them and attached to the titles and mailed to Nashville.

The defendant testified in his own behalf that he is not guilty, that he did not know the car was stolen. According to his testimony sometime in December 1969 he bought the 1966 Ford Mustang in question from Charles M. Cutshaw and paid Cutshaw $350.00 for it. That the transmission was slipping and he paid $150.00 to get it repaired. That he did not receive a title when he bought the car, that he was to receive a title in two or three months. The man he bought it from said it was not paid for, that he owed 2 or 3 payments on it. That he tried to get a title for the car from Hensleys' garage. That if he sold the car he intended to tell the purchaser he did not

have the right title for the car and that they could use that one until he got one.

That he sold the car to A. F. Munsey and told him the title was not the right title for the car and go ahead and drive it and as soon as he got the other title he would give him the original title. The defendant admitted he bought a 1965 Mustang which was totally wrecked, from Mr. Showman for which he paid him $30.00. That Showman gave him a title for it, that he has never taken any parts off of it. That the only thing he received from Showman was a title to a 1965 Mustang.

On cross-examination the defendant admitted that he notarized a title to the car in question showing Mary Lee Munsey sold the car to Ivan Duncan when in fact she did not convey the title to Duncan but that he, Shelton, sold it to Ivan Duncan and not Mary Lee Munsey.

Hubert Hutson testified in behalf of the defendant that about January 30, 1970 he installed a transmission and a torque converter in a 1966 Mustang for the defendant Shelton and charged him $128.90.

ASSIGNMENTS OF ERROR

In the defendant's 1st assignment of error he contends the evidence is insufficient to support the verdict of the jury and preponderates against the verdict and in favor of the innocence of the defendant.

This assignment must be considered under the rule that a verdict of guilt, approved by the trial judge, accredits the testimony of the State's witnesses, resolves all conflicts in the testimony in favor of the State and establishes the State's theory of the case; that under such a verdict the presumption of innocence which the law throws around

an accused and which stands as a witness for him in his trial, disappears, and upon appeal that presumption of innocence is replaced by a presumption of guilt; that this Court is not permitted to reverse a conviction upon the facts unless the evidence clearly preponderates against the verdict of the jury and in favor of the innocence of the accused; that we may review the evidence only to determine whether it preponderates against the verdict; and that the defendant has the burden of showing on appeal that the evidence preponderates against the verdict and in favor of his innocence. *Turner v. State,* 216 Tenn. 714, 394 S.W. 2d 635; *Chico v. State,* 217 Tenn. 19, 394 S.W. 2d 648; *Johnson v. State,* 217 Tenn. 234, 397 S.W. 2d 170; *Brenner v. State,* 217 Tenn. 427, 398 S.W. 2d 252; *Owens v. State,* 217 Tenn. 544, 399 S.W. 2d 507; *Harris v. State,* 217 Tenn. 582, 399 S.W. 2d 749; *Brown v. State,* Tenn. Crim. App., 441 S.W. 2d 485.

The defendant's 2nd assignment of error is that the evidence introduced at the trial through the testimony of Officer Finchum was the product of an illegal search.

Officer Finchum of the Tennessee Highway Patrol was off duty, working on his pickup truck "fixing it up for himself" at Hensley's A and 1 Used Car and Parts Garage late in January 1970. That he had a conversation with Mr. Hensley who evidently told him the defendant wanted to sell the 1966 Mustang. That he looked at a 1966 green Ford Mustang parked at the A and 1 Used Parts and Garage. That he looked the car over with the intentions of maybe buying it, he had been given the price, he was interested in buying it if he could get it at that price. That he looked at the serial number and wrote it down 6F07T 180 121. That he called Kingsport for the registration and found it was registered to Bruce McCloud. Later the defendant Shelton drove away in this

car. That he was interested in buying the car if he could get it at the price that had been quoted to him, $500.00 which was very cheap. That he had no information the car was stolen. They did not get a stolen report on it. That he did not search the car he just obtained the serial number by opening the door on the drivers side.

The trial judge conducted an evidentiary hearing, in the absence of the jury on the defendant's objection to this evidence and found that the opening of the car door by Officer Finchum and taking the serial number on the door frame was the action of a highway patrolman off duty, looking at the car as a prospective buyer, and that he made no search of the car, and what he did was neither unreasonable nor unlawful. We agree with the holding of the learned Trial Judge and find the evidence does not preponderate against his holding. We hold that Finchum made no unreasonable search of the car and that the evidence was admissible.

In the 3rd assignment of error the defendant complains that the trial judge erred in his instruction to the jury that in considering the testimony of the defendants that the jury should remember that the defendants are parties to the case and interested in the outcome.

One of the rules for weighing testimony is that the jury should consider the testimony in the light of the interest or lack of interest the witness may have in the out come of the lawsuit. It is difficult to conceive of anyone being more interested than the defendant, in the result of a trial of a felony case. When the judge said to the jury that it should remember the defendant is a party to the case and interested in the out come he was merely pronouncing a profound truth which the trial jurors already knew if they were giving careful attention to the issues.

We hold that such instruction was not error.

The proof in this case shows the defendant Shelton had been a used car dealer for five years. That the 1966 Ford Mustang in question was stolen in Knoxville in November 1969. That the defendant bought it from Charles Cutshaw who could not give him a valid title. That Cutshaw pleaded guilty under this indictment of receiving the stolen car. That the defendant Shelton sold the 1966 Ford Mustang to the Munseys without a serial number on it and without a valid title but defendant gave them a title to a different Mustang being a 1965 car that had been wrecked, and which he had evidently bought in an effort to obtain the title he could use. That the defendant made several unsuccessful efforts to buy a 1966 Mustang title from others particularly Embers Hensley the A and 1 Used Car and Parts dealer. When the Munseys discovered the defendant had sold them a car without a serial number on it they took the car back to him and he refunded their money. The defendant then sold the 1966 Mustang car to Ivan Duncan and surreptitiously showed the car was conveyed to Duncan in the name of Mrs. Munsey instead of correctly showing that it was conveyed by him.

We find the evidence does not preponderate against the verdict of the jury, and that the defendant's guilt has been clearly established.

The assignments of error are overruled and the judgment is affirmed.

/s/ JOHN A. MITCHELL
John A. Mitchell, Judge

CONCUR:

.....

William S. Russell, Judge

/s/ ROBERT K. DWYER,
Robert K. Dwyer, Judge

CONCURRING OPINION

I concur in the affirmance of this conviction and in the holding that the convicting evidence is legally sufficient.

I believe it unnecessary to hold that Officer Finchum's action in opening the car door and copying the serial number, after which he made a theft check (with negative results), was legal. The defendant testified that Finchum did not go near the car. Having taken that position (that there was no search) I do not judge that he is in a position to complain that what he says didn't happen actually constituted an illegal search. Hence, I would not reach the question.

I would further observe that Shelton's theory was that he didn't know that the car was stolen, not that it was not stolen; and I note further that the officer did not even learn that the car was stolen as a result of his alleged copying of the number from the door post. Further, the same number was found upon the car at other places at later times, when it was no longer in defendant's possession; so the evidence which identified the car as being stolen was unquestionably competently before

the jury, and did not depend upon Officer Finchum's testimony. In summary, the information obtained by the officer is not really in dispute (except as to the fact of his obtaining it). If his action was a search and it was illegal, no prejudice resulted to the defendant.

I would also express my personal disapproval of a jury charge that calls special attention to the interest of a defendant in instructing the jury how to weigh his testimony. I have always felt that such a charge is unfair. Certainly all defendants are interested in the outcome of a trial, both those who are truthful and those otherwise. To state the fact of peculiar interest, as was done in this case, seems to me to say more than it should and mean more than it says. Our Supreme Court has permitted it, and we likewise; but I personally feel that it would be better to simply say that the testimony of a defendant is judged by the same rules applicable to the testimony of all other witnesses.

/s/ WILLIAM S. RUSSELL
William S. Russell, Judge

ORDER OF SUPREME COURT OF TENNESSEE DENYING CERTIORARI

(Filed April 3, 1972)

SUPREME COURT OF TENNESSEE AT KNOXVILLE
September Term, 1971

DAVID EUGENE SHELTON

vs.

STATE OF TENNESSEE

DECREE—WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Greene County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner David Eugene Shelton will pay the costs incident to filing petition for certiorari, for which let execution issue.

BILL OF EXCEPTIONS, Pages 50-71

[50]

The Witness, ROBERT FINCHUM, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WEXLER:

Q And I believe you are a member of the Tennessee Highway Patrol? A I am.

Q And you was back in February and March of 1970? A I was.

Q Officer Finchum, did you have an occasion sometime in the month of February of 1970 or the later part of January of 1970, to be up at Mr. Hensley's Garage? A I was at the A and 1 used car and parts garage.

Q I believe he is the operator of that place or was at that time? A He was the manager or operator at that time.

Q What were you doing up there? A I had a pickup truck that I was working on and fixing up myself.

Q Alright, at this particular time do you remember the date? A I'm not positive of it. It was the later part of January sometime.

Q Was that your off day? A Yes, sir, it was.

Q You weren't on duty? **[51]** A No, sir.

Mr. Cutshaw: Object to the leading if the Court please. Also, it is immaterial.

The Court: Overruled, he said he had his truck there. Highway Patrolmen don't usually drive trucks on duty as all of us know. Overruled, go ahead.

Q Mr. Officer, I believe you had a conversation with Mr. Hensley there? A I did.

Q Now, you can't tell what that conversation was, but as a result of that conversation what did you do?

Mr. Cutshaw: Now if the Court please, we are going to object to what he did and ask that the jury be sent out for a few moments.

The Court: Well, if we are going to raise the question we may as well do it right. You will go to the juryroom, Gentlemen. You will not discuss any phase of it.

JURY OUT:

DIRECT EXAM CONTINUED:

Q Officer Finchum, as to this conversation you had with Mr. Hensley, what did you do? A I went to look at a 1966 Ford Mustang.

Q What color was it? A It was a dark green.

Q Where was it parked? [52] A It was parked at the A and 1 Used parts and garage.

Q Is that the same place you were working on your truck? A Yes, sir it was.

Q Alright, you say you went to look at this car. What did you do when you got there? A I looked the car over with intentions of maybe purchasing it. The price had been given to me, what they were asking for it. I checked the car over closely and I looked at the serial plate and I obtained the serial plate from the car at that time. I wrote it down on a piece of paper.

Q You say you obtained it. You just took it down? A I took it down on a small piece of paper at the time. The serial plate number on the car.

Q You didn't remove the plate? A No, sir. It was on the left door of the car.

Q All right, what number did you take down? A The number that I wrote down was 6F07T180121.

Q All right, after you took that number down what did you do? A Later in the day I called Kingsport to get a registration check on the vehicle.

Q All right, what was the results of that? A The registration showed the car registered to Bruce McCloud.

Mr. Cutshaw: Objection.

[53] The Court: Overruled, the Jury is out. The Court wants to hear whatever the Court should hear.

Q Any other information? A Only his address of 3612 Cunningham Road, Knoxville, Tennessee.

Q All right, were you out at Mr. Hensley's Garage when this car left? A To the best of my knowledge I was there when he left.

Q. All right, who drove the automobile away? A Mr. Shelton.

Q How long after you had looked at it there was it until he left? A Well, it was some time. As well as I remember he went down into the field to look for some parts or something.

Q All right, were you there when the car was driven up to the garage? A I was.

Q Who drove it up there? A I couldn't say. I was inside the building.

The Court: Well, we sent the jury out for some purpose. You might go into it, Mr. Cutshaw.

CROSS EXAMINATION BY MR. CUTSHAW:

Officer Finchum, you recall testifying down in Sessions Court, do you not? [54] A Yes.

Q And do you recall testifying that when you saw Mr. Shelton out there, that you went there and inspected the car and took this number down? A When he was out there?

Q No, when you went out to look this car over? A I went to his car, yes, sir.

Q Did you have a search warrant or anything? A No, sir.

Q Did you suspect anything? A Well, upon information received, yes, sir.

Q Then of course you were checking out the car for information if it was necessary to charge anyone? A Well, I had been given a price that the car had been offered for sale for. I was interested if I could purchase the car for that price.

Q Directing your attention to the preliminary hearing. Do you recall that you testified there that you saw him go in Hensley's Garage and that you decided to sneak out there and get the number off the car?

Mr. Wexler: We object to the leading.

Q Well, if the Court please, the jury is out, and this is cross examination. A I did copy down the serial number plate from the door of the vehicle.

[55] Q Did you have his permission to go out there? A No, sir, I didn't.

Q Now, you didn't testify at the lower Court that you were interested in buying this car? A Well, I had heard the price mentioned.

Q Did you ever talk to Mr. Shelton here about the car? A No, sir.

Q What kind of price had he give you on the car? A Five hundred dollars was the price I heard Mr. Hensley say. He is the one that told me.

Q But you didn't talk to Shelton about the car? A No, sir.

Q Of course, you knew Shelton was a used car salesman and had been for some period of time? A Yes, sir.

Q What date did you say this was? A I couldn't say positive. It was sometime in January to the best of my recollection.

Q Was this the later part of December? A I don't much think it was. It could have been after Christmas, but I don't much think it was. The best I recall it was in January.

Q When Shelton came in you talked to him, did you not, prior to going out to the car? A I believe he spoke there in the building as he came through. **[56]** I believe he spoke and went on out to look for some parts or something.

Q He was driving and had possession of the car? A The best I recall he was with a couple of more boys that came up at the same time.

Q Did you get permission for anyone to go out and get this information off the automobile? A I did not.

Q Did you do anything further with this after January? A At the time I called in for the registration check I didn't receive a stolen report on the vehicle. Therefore, I didn't think anymore of it.

Q If it was a stolen car why didn't you receive notice of it? A In most cases they put a Stop or something on it, that it is stolen. But in this case we didn't get a stolen report on it.

Q You had the man's name and address didn't you? A I had his name and address, but I didn't have any knowledge that it was stolen.

Q But you suspected something? A Well, I only called it in to see if it was on the registration check, but I didn't receive any notice back that it was stolen.

Q How come you to suspect the car was stolen? [57] A Well, the price that it had been priced for was very cheap.

Q Did you know the transmission was about out of it? A No, I didn't.

The Court: Well, Gentlemen, a question was raised and the jury sent out about the legality or illegality of the search. These are other matters can very well be testified before the jury. Now, anything else about the search or what you call a search, Mr. Cutshaw?

Q You had no search warrant? A No.

Q. That's all.

RE-DIRECT EXAMINATION BY MR. WEXLER:

Q Officer Finchum, did you search it? A No, sir, I didn't search it. I just obtained the serial plate number by opening the door on the driver's side. I never entered the car for any other purpose.

Q Did you get anything out of that car other than what you wrote down? A No, sir, I did not.

The Court: The Court holds that if someone is interested in buying an automobile he certainly has a right to make a reasonable inspection of it. He wasn't hunting for any contraband. He was looking for the serial number only. [58] The Court holds that his testimony pertaining to that phase of it is competent, but as to conversations with others, of course, you will not go into that.

Mr. Cutshaw: If the Court please, we respectfully reserve exceptions. For the record we would like to point out that he testified that he had a suspicion that the car was stolen and he went out there without anyone's permission and got the number off the car for the purpose of checking. The defendant was present there with him and he could have got permission, yet he did not.

The Court: Well, Gentlemen, if he had reasonable grounds that it was stolen he had a right to seize it. The Court holds that what he did was not unreasonable. The law about searches and seizures is for unreasonable searches and seizures. It doesn't apply to what is reasonable. So, let the jury come back in please.

WHEREUPON JURY RETURNS:

DIRECT EXAMINATION CONTINUED:

Q Now, Officer Finchum, I believe we had gotten to where you had certain conversations and you went out to check the 1966 Mustang automobile that you heard was for sale. What did you do when you got out there? A I just casually looked at the car. Then I checked the serial plate on the left door.

Mr. Cutshaw: Again we object to the introduction of this [59] evidence by Officer Finchum. On the grounds that it was an illegal search and seizure and that he had no permission whatsoever to open the car door or to get any numbers or anything from the automobile.

The Court: Your objection is overruled. You may treat it as a continuing one, Mr. Cutshaw, if you wish to.

Q At the time you went out to look at the automobile, where was David Shelton? A He had gone to the rear of the building with a couple of other boys to look for some parts.

Q Had there been some price given to you on this car? A Yes, sir, they had.

Q All right, what price? A Five-hundred dollars.

Q Were you interested in it? A Yes, if the transmission and everything was good in it, yes, I was.

Q Say you look at the serial number on the door? A I did.

Q All right, did you take down that serial number? A I did.

The Court: All right, just a minute before the Court forgets it. Gentlemen of the Jury, you will not consider the fact of any price that was mentioned.

You may consider he was given a price, but you will not consider five hundred [60] dollars or any other price. That was not in the presence of the defendant.

Q Which door did you obtain this number from? A The left door, the driver's side.

Q All right, and what number did you take down? A The number that was on the serial plate on the door was 6F07T180121.

Q All right, after you took that number down what, if anything, did you do with it? A Sometime later during the day I called Kingsport to get a 10-28 or registration check on the vehicle.

Q All right, did you get a reply as to that?

Mr. Cutshaw: Objection, Your Honor.

The Court: Sustained. He may state that he got a reply, but not what the reply was.

Q Did you get a reply? A I did.

Q What is the procedure of getting a 10-28? A Well, that is a routine check of the County Court Clerk in obtaining the type of vehicle registered and the individual the serial plate would be registered to.

Q Had you seen this automobile at any other time, since that day in January or whenever that was at Hensley's Garage? A Yes, sir, I did.

Q All right, where did you see it? [61] A The next occasion I had of seeing the vehicle was at the American 11-E Station on U.S. 11-E.

Q All right, when was that? A It was the later part of February to the best of my knowledge.

Q Who had it there, if you know? A Mr. Munsey.

Q Was Mr. S. O. Trent around at that time? A At this particular time I don't believe he was. The best I recall I was there and Mr. Munsey.

Q Now, did you and Mr. Munsey have any conversation concerning this car, but don't tell what it was? A Yes, sir, we did.

Q As a result of the conversation you had with Mr. Munsey what, if anything, did you do? A I tried to obtain the title or something from Mr. Munsey. At the time I was unable to do so. He didn't have the title to produce.

Q Have you seen this car at any other time other than the garage and the service station? A No, sir.

Q Officer Finchum, at the time you went out to look at this automobile at Mr. Hensley's Garage, did you take anything out of it? A No, sir, I did not.

[62] Q Did you search it? A I did not.

Q The only thing was what you wrote down on a piece of paper? A, Yes, sir.

Q You may ask him.

CROSS EXAMINATION BY MR. CUTSHAW:

Q You took the number off of it, didn't you? A I wrote the serial number down on a piece of paper, yes, sir.

Q Officer Finchum, you recall testifying down in the lower Court at the Preliminary Hearing, do you not? A Yes, sir.

Q Do you recall testifying that you were out at the A and 1 Garage talking to Embers Hensley? A I was.

Q David Shelton came up and went out in the yard picking up some parts? A Yes, sir.

Q Do you recall testifying that you saw a car out there and had some suspicion and then went out there and got the number off of it? A I went out and got the serial plate number, yes, sir.

Q You weren't interested in buying that car now, were you? **[63]** A Yes, sir, I buy a car every now and then.

Q Did you ever talk to David Shelton here about buying that car? A No, sir.

Q You never had seen the car prior to this time, had you? A I believe I had seen the car prior to this, but I never looked at the car or anything of that nature.

Q Of course, David Shelton lives here in Greeneville and has all his life hasn't he? A Yes, sir.

Q Have you ever bought any cars from him before? A No, sir, I haven't.

Q Do you know what condition this car was in? A Mechanically or what?

Q You didn't drive it, did you? A I didn't drive it, no sir.

Q Did you have permission from Shelton to go out there and look at it and get the numbers off the car? A I did not.

Q Did you talk to him before you went there or any other time about looking at the automobile? A I did not.

Q Who else was present out there when you looked at the car? A Mr. Hensley, Grant Green, and Obe Martin are the only ones that I can recall that were present at the time.

[64] Q What is this number again that you said you took off there? A 6F07T180121.

Q Did you write it on that sheet of paper there that day? A I did.

Q Do you know who stole that car? A No, sir, I don't.

Q Don't know anything about who stole it or who brought it or who bought it to start with or anything else? A I don't.

Q Has anybody been convicted of stealing the car to your knowledge? A No, I didn't have any knowledge of it at the time.

Q Has anybody been convicted of receiving and concealing the car to your knowledge? A (No response)

Q You say this was in January when you were at the garage? A Yes, sir.

Q Are you sure this wasn't back in December? A The best I recall it was after Christmas and I believe it was in January.

Q You believe it was in January, but it could have been in December? A Well, it could have been the later part of December.

Q That car stayed around here in Greene County for a long period of time, did it not? A Well, I don't know how long. I seen Mr. Shelton driving [65] the car prior to this occasion, but I wouldn't know how long because he does drive a lot of different cars.

Q Did you know the transmission was about out of the car? A I didn't have any knowledge that the transmission was bad.

Q Have you ever talked to Mr. Shelton about the car? A No, sir.

Q That's all, Your Honor.

CROSS EXAMINATION BY MR. RUSSELL:

Q Mr. Finchum, you say you checked this car some time in January? A To the best of my knowledge it was some time in January.

Q It was a 1966 green Mustang? A Yes, sir.

Q And what type of business does Mr. Hensley have? A He has a used car parts. Where they buy wrecked vehicles and dismantle them and sell used parts.

Q And this is located where? A Just northeast of Greenville on Highway 97.

Q What we call the Kingsport Highway? A The Kingsport Highway, approximately a mile from the City Limits.

Q Well, when you went up there to inspect this car, did you understand it was owned by Mr. Hensley? A Well, I didn't go up there to inspect it. I was already **[66]** up there working on a vehicle of mine.

Q Well, did you see the car pull up there or was it already sitting there when you arrived? A It came in while I was there. I seen Mr. Shelton and 2 more subjects, I don't know their names, come in.

Q They were driving it? A They got out of the car and came in the building.

Q Now, you said you saw this car some other time. Was this before or after you had - - - - A I had seen it prior to this occasion, yes, sir.

Q What was the occasion you happened to see this car prior to this? A Just on routine patrol I observed Mr. Shelton operating it.

Q Well, you said Mr. Munsey owned the car or had it in his possession? A Yes, I seen it when Mr. Munsey had it.

Q Was that after this occasion? A Yes, sir, it was some time after I had observed the car at A and 1 that Mr. Munsey had the car. It was quite some time after that.

Q I believe that is all.

Mr. Wexler: Officer Finchum, I believe you have a paper that you wrote this information down on?

A Yes, sir.

Mr. Wexler: Will you file that as Exhibit Number 9 to your testimony?

[67] A Yes, sir.

Mr. Cutshaw: Object to the filing of that if the Court please. This has got other things on there that you wouldn't let him go into.

Mr. Wexler: If the Court please, if they want to cover that up that is alright.

Mr. Cutshaw: We don't want to cover nothing up. We are not hiding anything here.

The Court: The Court is attaching a paper to it. The only part that shows is a number and says '66 Ford Mustang, dark green. The shape it is now it may be filed as an exhibit.

Mr. Cutshaw: If the Court please, the defendant objects to it being filed for 2 reasons. First of all, it is not pertinent. Also, the other part the Court ruled out on our objection thereto.

The Court: All right, objection is overruled. It is a paper writing that he says he wrote down on that occasion. Let it be filed as Exhibit number 9. You may proceed.

Q That is all.

Mr. Cutshaw: One other question. Officer Finchum, did you suspect the car was stolen when you were up at the A and 1 Garage?

A Well, upon receiving information on the car, the price I had received, naturally we had suspicion that it might be stolen.

[68] Mr. Cutshaw: You mean a '66 Mustang with the transmission out and the - - -

Mr. Winstead: Object to that question. There is no proof that the transmission was out, Your Honor.

The Court: Sustained.

Q You mentioned something a few minutes ago that it would be a good buy if the transmission was not out of it, did you not? A Well, from the overall appearance the car would have been worth eight or nine hundred dollars probably.

Q Do you know what David Shelton was doing up there at that time? What kind of parts he was trying to

buy for this automobile? A I do not. I never heard him say.

Q And after you got the number you checked to see if it was stolen? A I did. I called and got a registration check on the vehicle. Normally if an individual has a car stolen they had a 10-44, what we call a stolen report on the car, but it was not given back as a stolen car. Therefore, I accepted it as not being a stolen car.

Q They gave you this man's name when you were checking it out, did they not? A Yes, they did, but they obtained that name from the County Court Clerk's Office.

[69] Mr. Wexler: Now, if the Court please, that name is what he has objected to all along.

The Court: The Court sustains it as being argumentative.

Q Did you contact the individual that this car belonged to? A Personally?

Q Yes. A No, sir.

Q Through your investigation did the Tennessee Highway Patrol contact the individual to see if the car was stolen or not? A Not normally on a registration check.

Q Well, what do you arrive at having a registration check to see whose name it is, is to see whether the car is stolen or not? A We check to see who the car is registered to and it is in that process that they tell us if the car is stolen. Not in this case though, because it didn't come back as a stolen car.

Q You check the registration to get the person's name and then you don't check the individual to see if the car is stolen, is that what you are telling us? A In most cases the County Court Clerk would know that the vehicle had been stolen. In getting the 10-28 or registration check we come up with this stolen report. In this case we did not come up with it.

[70] Q Does the Tennessee Highway Patrol office call the County Court Clerk's of each county and advise them that this car has been stolen? Is that the way this procedure works? A The way it works. On a form report the individual reports the car stolen to the local law enforcement officers in their area. Notice goes out on it. Then a registration check on that vehicle comes back as a stolen vehicle, but we did not get that back on this vehicle.

Q Are you trying to tell this Court and this Jury that all you do is check and see whose name it is registered in and that's all you do when you suspect that a car is stolen? A That's right.

Q Do you find any stolen cars? A Yes, sir, quite a few.

Q The Clerk always notifies you when a car has been stolen? A We get a reply that it is a stolen vehicle.

Q From the County Court Clerk's office? A Yes, or from wherever we obtain the registration check from. If it comes through the Sheriff's Office of that county to the County Court Clerk's office it comes back as a stolen vehicle.

Q When was the car stolen, do you know? A I don't know. I didn't get the report on it that it was a stolen car.

[71] Q How many times have you seen him driving the car around Greenville here? A I wouldn't have any idea.

Q You saw him driving it after you took this down? A No, I can't say that I saw him driving it after this. I saw the car after this.

Q Those other people that bought it have driven it? A Yes.

Q That's all.

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Supreme Court, U. S.
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October Term 1971

No. 71-1706

DAVID EUGENE SHELTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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OPINION BELOW

The unreported opinion of the Court of Criminal Appeals of Tennessee was entered and filed on 11 February 1972. The Supreme Court of Tennessee denied the petition for certiorari in an order filed 3 April 1972. Both the decision of the Court of Criminal Appeals and the order of the Supren Court are appended to the petition for certiorari filed on the behalf of David Eugene Shelton, petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The respondent is not dissatisfied with the presentation of the questions by the petitioner, except to note that none of the issues raised presents a federal question of substance.

STATEMENT OF THE CASE

The petitioner, David Eugene Shelton, was convicted on 5 September 1970, in the Criminal Court of Greene County, Tennessee, of receiving a stolen automobile over the value of one hundred dollars ($100). The jury sentenced the petitioner to confinement for a period of four (4) years. The Trial Judge entered the judgment in accordance with the jury's verdict and announced a sentence of not less than three (3) nor more than four (4) years in the State Penitentiary. Upon the overruling of petitioner's motion for a new trial, the petitioner prayed for, was granted, and duly perfected an appeal-in-error to the Court of Criminal Appeals of Tennessee. The Court of Criminal Appeals of Tennessee in an unreported opinion filed on 11 February 1972 affirmed the judgment of the Trial Court. On 3 April 1972 the Supreme Court of Tennessee denied a petition for a writ of certiorari filed by the petitioner.

ARGUMENT

The respondent contends that the Trial Court was correct when, after hearing testimony out of the presence of the jury, he ruled that there was no search of the automobile. The evidence disclosed that one Robert Finchum, an off-duty highway patrolman, inspected an automobile which he was interested in purchasing and wrote down the serial number of that automobile.

The respondent further asserts that the conviction would not fall without the testimony of Finchum.

The testimony of Finchum, set forth at pages 15 thru 30 of the Appendix to the petition, shows that in late December or early January, Finchum, in an off-duty status, was working on his personally-owned pickup truck at a used car lot and junkyard managed by one Mr. Hensley. The petitioner arrived at the lot in a 1966 green Mustang automobile.

Although the petitioner did not speak with Finchum, the latter came to understand in a casual conversation with Hensley that the Mustang was for sale by the petitioner. (Appendix to Petition, pp. 16-17, 21-22). While petitioner was elsewhere on the lot, Finchum sought to examine the automobile. He asserted that he copied the serial number from the door frame in order to ascertain whether or not the automobile was stolen. The exceedingly low price which had been quoted him suggested this precaution. (Appendix to Petition, pp. 19, 23).

It is apparent that Finchum's examination of the automobile was merely that of an interested prospective purchaser. He testified that he knew that the petitioner was in the used car business and thus, it was quite likely that the car which he was driving was indeed for sale. Finchum's attention to the detail of the serial number was only that of a reasonable person who, in anticipation of a bargain, wants to assure himself that the item which he might purchase is legitimately in the flow of trade. There was no search in the constitutional sense and the evidence was properly admitted.

The respondent asserts that there was no search involved in the obtaining of the automobile serial number. The petitioner's argument is convincing wherein it is noted that

the "search" was not incident to any arrest. The respondent has never and is not now asserting such a theory. The petitioner's argument that exploratory searches are not approved is also correct. However, the respondent would point out that in the case at bar, Finchum sought to view only one thing, the automobile's serial number. He did so. Thus, his view was neither "exploratory" nor a "search".

The petitioner asserts that if officers had had probable cause to search the automobile, they would nevertheless have had to procure a search warrant. The respondent does not disagree, but notes that in this particular instance, at the time Finchum viewed the serial number there was no indication that any crime had been committed, and there was no cause to search the automobile for evidence of or fruits of a crime.

In view of the reasons asserted above, the respondent submits that there was no search and that the evidence procured by Finchum's view of the automobile serial number was properly admitted into evidence. In the instant case, the petitioner has failed to show that the question here involved is substantial or is of broad national concern.

CONCLUSION

As the petitioner presents no question which merits this Honorable Court's review upon a writ of certiorari, respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALEX B. SHIPLEY, JR.
Assistant Attorney General